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No. 73-373

IN THE

Supreme Court of the United States

OCTOBER TERM OF 1973

ALASKA BARITE COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit is not yet officially reported, but appears at 83 L.R.R.M. 2992. The Decision and Order of the National Labor Relations Board is reported at 197 NLRB No. 170 (1972). The Opinion of the Ninth Circuit Court of Appeals is reprinted herein as Appendix A, the Decision and Order of the Board is reprinted herein as Appendix B, and the Trial Examiner's Decision is reprinted as Appendix C.

JURISDICTION

The Judgment of the United States Court of Appeals for the Ninth Circuit was entered July 12, 1973. This petition is being filed within ninety (90) days of that date. This Court has jurisdiction under 62 Stat. 928, 28 U.S.C. § 1254(1).

The jurisdiction of the United States Court of Appeals for the Ninth Circuit rested upon 49 Stat. 453, 29 U.S.C. § 160(e).

QUESTIONS PRESENTED

Whether non-employee, full-time union organizers have an absolute right to complete, unregulated access to an employer's private property to carry on a union campaign prior to an election conducted by the National Labor Relations Board, without utilizing any of the available alternative means of communication with the employee voters?

Whether the implicit holding of the Ninth Circuit that non-employee, full-time union organizers are entitled to complete, unregulated access to an employer's private property at any and all times of their choosing, without showing any attempted utilization of any of the alternative means of communication with the employee voters, conflicts with the holdings of this Court in *Central Hardware Co.* v. *NLRB*, 407 U.S. 539 (1972) and *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105 (1956); the holding of the Eighth Circuit in *Central Hardware Co.* v. *NLRB*, 468 F.2d 252 (8th Cir. 1972); the Second Circuit in *NLRB* v. *New Pines, Inc.*, 468 F.2d 427 (2d Cir. 1972) and *NLRB* v. *Kutsher's Hotel & Club*, 427 F.2d 200 (2d Cir. 1970); the Third Circuit in *NLRB* v. *Tamiment, Inc.*, 451 F.2d 794 (3d Cir. 1971), *cert. denied*, 409 U.S. 1012 (1972); and the Sixth Circuit in *May*

Department Stores Co. v. *NLRB,* 316 F.2d 797 (6th Cir. 1970)?

Whether the court below erred in its implicit holding, contrary to the holding of the Eighth Circuit in *Central Hardware Co.* v. *NLRB,* 468 F.2d 252 (8th Cir. 1972), on remand from 407 U.S. 539 (1972), that the burden is on an employer to demonstrate that alternate available means of communication with employee voters are sufficient before an employer may question some implied right of access in non-employee union organizers to an employer's Constitutionally protected private property?

Whether there is substantial record evidence that Alaska Barite Company ever denied reasonable access to the non-employee union organizer?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the U.S. Constitution [U.S. Const., Amend. V] provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Section 8(a)(1) of the National Labor Relations Act, as amended [29 U.S.C. § 158(a)(1)], provides:

> "Section 8(a). It shall be an unfair labor practice for an employer —

> "(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7."

Section 7 of the National Labor Relations Act, as amended [29 U.S.C. 157], provides in pertinent part:

> "Section 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . . ."

STATEMENT OF THE CASE

This Petition seeks review of a decision by the United States Court of Appeals for the Ninth Circuit enforcing an Order of the National Labor Relations Board, hereinafter referred to as "Board." The Board found that Alaska Barite Company, hereinafter referred to as "Company," had violated Section 8(a)(1) of the National Labor Relations Act, hereinafter referred to as "Act," by denying a non-employee union organizer's last-minute demand for unregulated and unrestricted total access to the Company's entire facilities for the last three (3) nights prior to a Board-conducted representation election.

It is undisputed that the union organizer had made absolutely no attempt to utilize any alternate means of communication with the Company's employees.

This case quite simply involves the question of a non-employee union organizer's claimed right of access to private property to carry on a union pre-election campaign without exploring or utilizing any of the available alternate means of communication. It is set in the background

of a very low-key pre-election campaign by the Company; absolutely no showing of coercion, discrimination or other anti-union conduct by the Company and an almost total lack of interest in the Company's ten employees by Local 302, International Union of Operating Engineers, hereinafter referred to as "Union." The Union, in fact, ignored the ten employees it was supposedly seeking to represent until the final hours before the election, and then demanded unlimited access based upon its own previous lack of effort.

The Company is engaged in the mining of barite ore at its facility on Castle Island No. 2 in the State of Alaska. The Company had ten employees at this site at all times material. The Company's operations are located near Petersburg, Alaska, where many of its employees maintain residences and most spend their weekends. All of the Company's employees are free to go to Petersburg on week nights and weekends. Transportation to Petersburg is readily available.

On February 28, 1971, a Union organizer met with a group of the Company's employees in Petersburg, and procured signed authorization cards from sufficient employees to file a representation petition with the Board's Nineteenth Region on March 8, 1971. An agreement for a June 25 consent election was reached.

Pursuant to the Board's *Excelsior* election rule,[1] the Company submitted two copies of the names and addresses of the eligible ten employee-voters to the Board's Nineteenth Region, and the Nineteenth Region then sent one of these name and address lists to the Union for its pre-election campaign use. From February 28 until June 22, a period of almost four months, the Union made absolutely no attempt to communicate with the employee-voters.

[1] *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966).

On June 22, three days before the June 25 election, a Union organizer arrived unannounced at the Company's facility, without any prior communication with either the Company or its attorney. The Company invited the Union organizer to have lunch with the employees. At the conclusion of the lunch hour, the Union organizer arrogantly stated to all present that he would be campaigning on the Company's facilities each night until the election.

Because of this last-minute, extensive Union demand, the Company's Manager returned to Petersburg with the Union organizer, in order to call the Company's attorney. After discussing the matter with the Company's attorney, the Company's Manager rejected the Union organizer's last-minute demand because it was thought to be far too extensive and unreasonable. The Union organizer then expressed a desire to come onto the Company's dock to campaign. The Company's Manager agreed to this request and also agreed to notify all of the employees of the Union organizer's presence on the dock.

Thereafter, the Union organizer was allowed to campaign on the Company's dock and to distribute Union election literature without interference, and no further request for access was ever made by the Union organizer. The Union organizer voluntarily chose to utilize the Company's dock on only two of the three days remaining before the election.

On the morning of the election, the Company had one of its employees call the Union organizer and invite him to have lunch with the employees without the presence of management officials. The Union organizer refused this opportunity to talk to the employees.

While the Company recognizes that under certain conditions limited access is to be afforded to non-employees to facilitate the employees' exercise of their rights provided

by Section 7 of the Act, the decisions of this Court and those of many of the Circuit Courts of Appeal require the meeting of certain prerequisites by a non-employee Union organizer who seeks access to private property. The Board and the Ninth Circuit both ignored the fact that the Union did not and could not make any showing that the alternative means of communication with the Company's employees were inadequate, and also ignored the undisputed and admitted fact that the Union never attempted to utilize *any* alternative means of communication before making its demand of the Company.

The Union made only two requests for access, the first of which was clearly unreasonable and was the only request denied by the Company. Since the Company denied the Union's first unreasonable request and granted the Union's alternative request and then afforded the Union more access than was secondarily requested or subsequently utilized, there is no evidence that the Company ever denied reasonable access to the Union.

REASONS FOR GRANTING THE WRIT

I.

THE ENFORCEMENT OF THE BOARD'S ORDER IS CONTRARY TO THE DECISIONS OF THIS COURT

This Court, in weighing the Constitutionally protected property rights of an employer against the indirect assistance afforded to employee statutory rights by the grant of access to private property to a non-employee union organizer, has held that rights of non-employees to such access are greatly circumscribed. *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105 (1956). This Court there said:

> "The Act requires only that the employer refrain from interference, discrimination, restraint or coercion

> in the employees' exercise of their own rights. It does not require that the employer permit the use of its facilities for organization when other means are readily available." 351 U.S. at 113-14.

In 1972, this Court ruled:

> "The principle of Babcock is limited to this accommodation between organization rights and property rights. This principle requires a 'yielding' of property rights only in the context of an organization campaign. Moreover, the allowed intrusion on property rights is limited to that necessary to facilitate the exercise of employees' § 7 rights. *After the requisite need for access to the employer's property has been shown,* the access is limited to (i) union organizers; (ii) prescribed nonworking areas of the employer's premises; and (iii) the duration of organization activity. In short, the principle of accommodation announced in Babcock is limited to labor organization campaigns, and the 'yielding' of property rights it may require is both temporary and minimal." (emphasis supplied)

Central Hardware Company v. *NLRB,* 407 U.S. 539, 33 L. Ed. 2d 122, 127 (1972). Of course, the *Central Hardware* case dealt with access to a parking lot otherwise open to the public.

The Ninth Circuit and the Board relied upon *Babcock & Wilcox, supra,* but failed to note the rule stated by the Court that only "when the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels, the right to exclude from property has been required to yield to the extent needed to permit communication of information on the right to organize." *NLRB* v. *Babcock & Wilcox Co., supra,* at 112. Thus, the Ninth Circuit and the Board erroneously applied a balancing test, and created a new

standard by ignoring the requirements that the Union must utilize alternate methods of communication and show that the alternate methods thus utilized were ineffective.

The Union was able to obtain sufficient authorization cards to procure an election through alternative means of communication, but never again used these methods in its election campaign. Instead of utilizing any alternative means, the Union simply decided to commandeer the Company's private property for its election campaign in a last-minute "blitz" on the last three (3) days before the election. The alternative means were sufficient to organize the employees, and the Union and the Board have not and cannot show that these alternative means were insufficient for the election campaign, because the Union did not even bother to attempt to use them.

II.

THE ENFORCEMENT OF THE BOARD'S ORDER CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS IN NOT REQUIRING THAT THE UNION UTILIZE ALTERNATE MEANS OF COMMUNICATION

This Court's decision in *Babcock & Wilcox, supra,* clearly sets the guidelines for the imposition by the Board of an involuntary statutory servitude upon private property. Such guidelines struck an appropriate balance between an employer's Constitutionally protected property rights and the indirect assistance to employee statutory rights resulting from the grant of access to non-employees. *Babcock & Wilcox* clearly states that it is only, "when the inaccessibility of employees makes ineffective the reasonable attempts by non-employees to communicate with them . . ." that a limited infringement upon property rights is allowed. *NLRB* v. *Babcock & Wilcox, supra* at 112.

In accordance with the *Babcock & Wilcox* holding, the Sixth Circuit in *May Department Stores Co.* v. *NLRB*, 316 F.2d 797, 800 (6th Cir. 1963), stated as follows:

> "The Board majority acknowledges that Babcock and Wilcox puts the union to the use of methods of communication other than contact on the employer's premises if other means are available to the union."

In following *Babcock & Wilcox*, the Third Circuit in *NLRB* v. *Tamiment, Inc.*, 451 F.2d 794 (3d Cir. 1971), *cert. denied*, 409 U.S. 1012 (1972), was faced with a case involving facts much more favorable to a union's right to access. There, the union utilized alternative methods of contact such as talking to employees off the employer's property at places including local taverns. The court held that "[t]he union must make reasonable efforts to communicate with workers through alternative means and arrangements when seeking face to face contact." 451 F.2d at 798. The court went on to suggest that the "first and most obvious procedure" is to "diligently" attempt to reach employees when they are not on the employer's property. 451 F.2d at 798. In the case at bar, the one Union attempt to reach employees off the Company's property was successful and then, apparently startled by its success, the Union never tried it again.

The court in *Tamiment* further found that the failure of the union organizer's efforts to reach employees off the employer's property was wholly insufficient to demonstrate the lack of alternative methods. The court, rather, pointed to the failure of the union to request a list of employees' names and addresses so that mail could be sent to them. As the Court said:

> "Although mail is no substitute for face to face contact . . . the Board has found letter writing a useful first step in communicating with employees."

451 F.2d at 798. While the court in *Tamiment* faulted the union for not requesting a list of employees so that mail could be sent to them, in the case at bar, such a request was unnecessary since the Union received such a list from the Company pursuant to the Board's *Excelsior* list requirement that the Company provide the names and addresses of the eligible employee voters within seven days after the election agreement is approved by the Board.[2] Yet the Union chose not to utilize this readily available means of communication.

Just as the court pointed out in *Tamiment*, the Union did not request the right to post notices on the Company's property, and did not attempt to arrange for any meetings for employees. 451 F.2d at 799. The Court's conclusion in *Tamiment* is even more applicable to this case:

> "The record in this case shows nothing more than minimal efforts to communicate with respondent's employees. We are not satisfied that there is 'substantial evidence on the record as a whole' to warrant an invasion of private property by non-employees for union organizational purposes." 451 F.2d at 799.

Furthermore, the court ruled:

> "The union must make reasonable efforts to communicate with workers through alternative means and arrangements when seeking face to face contact. The first and most obvious procedure for the union to follow would be to attempt diligently to reach workers when they are off company property." 451 F.2d at 798.

The union had attempted to communicate with the employees in *Tamiment;* however, the court held that the union's unfruitful effort did not amount to an adequate

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[2] See n. 1, *supra*.

basis for finding the union lacked reasonable alternative means of communication. The court also held that:

> "It is only after the union has made a showing that it used reasonable efforts to utilize 'other available channels of communication' that the Board should proceed to consider the total effectiveness of these efforts and the countervailing inconvenience and injury to the employer having union organizers on his premises. Were the union to have made the necessary showing in this case, it seems clear that such additional questions would have been proper for the Board's consideration." 451 F.2d at 799.

Similarly, in *NLRB* v. *Kutsher's Hotel & Club*, 427 F.2d 200 (2d. Cir. 1970), the Second Circuit denied enforcement of the Board's finding that the employer had violated Section 8(a)(1) by refusing access to union representatives for organizing employees, and, in so doing, the court relied heavily upon the scant union effort to contact the employees by other means. The Second Circuit again in *NLRB* v. *New Pines, Inc.*, 468 F.2d 427, 429-30 (2d Cir. 1972), recently reaffirmed this holding, saying:

> "As already indicated, one of the crucial questions in access cases is whether a union, before insisting that an employer 'aid organization,' has itself made 'reasonable' attempts to communicate with the employees it seeks to organize. . . . We cannot disregard the union's lackadaisical organizing effort during the earlier, peak period in assessing the overall 'reasonableness' of its efforts to communicate."
>
> • • •
>
> "In short, on this record the union's organizing efforts were simply insufficient to require the hotel to grant access to the union's organizer."

The Board itself, in accord with *Babcock & Wilcox*, has in other cases placed a heavy burden on unions to attempt alternative methods of communication before ordering

access to private property for non-employees. *Dexter Thread Mills, Inc.*, 199 NLRB No. 113 (1972); *Monogram Models, Inc.*, 192 NLRB No. 99 (1971).

The statements of the Second Circuit in *NLRB* v. *Kutsher's Hotel & Club, supra* at 201, seem tailor made for this case:

> "Nor could the scant union efforts made here be characterized as 'reasonable' if an effective organizational campaign were being carried on."

In this regard it should be noted that the Ninth Circuit's departure from the *Babcock* and *Tamiment* rule creates an intolerable situation. In the first place, this departure rewards a union for lack of effort and penalizes the diligent union. A union that diligently uses alternative means and finds them successful, has no right of access. On the other hand, a union that makes no effort to utilize alternative means can, based upon such lack of diligence, receive apparently unlimited access to employees on private employer property. It is very doubtful that such a policy will foster the protection of Section 7 rights, since a union that is demonstrably the least likely to aggressively represent the employees and their protected rights is given a favored legal position and can require employer assistance in its pre-election campaign.

Secondly, the lack of wisdom in the Ninth Circuit's new rule is readily apparent upon consideration of the greater burden it places upon the Board and the courts. This new rule requires the hypothetical assessment of untried alternative means of access as either reasonable or unreasonable. Such difficult hypothetical assessments are unnecessary under *Babcock* and *Tamiment*. Due to the importance of these assessments, since they result in the invasion of Constitutionally protected property rights, they should not

be undertaken in hypothetical situations and such invasion of property should only be authorized where a real need can actually be demonstrated.

It is undisputed and admitted that the Union voluntarily refused to utilize any other available means of communication with the employees after February 28, almost four months before the election. The Union organizer failed to use the *Excelsior* address list in his possession to write letters to the ten eligible voters, and admittedly failed to utilize any other available means of contact, including the previously successful technique of employee meetings in Petersburg. Having totally failed to utilize any of the other available means to communicate with the employees, there is and can be no showing that these other means of communication would not have been effective. In fact, the Union organizer's weekend meeting with some of the eligible voters on February 28 proved effective enough to secure sufficient authorization cards to file an election petition.

III.

THE ENFORCEMENT OF THE BOARD'S ORDER CONFLICTS WITH THE EIGHTH CIRCUIT'S DECISION IN CENTRAL HARDWARE BY REQUIRING AN EMPLOYER TO PROVE ITS EMPLOYEES "ACCESSIBLE"

The Union presented virtually no evidence as to the inaccessibility of the Company's employees, as it could not, since the only time it attempted to communicate with the Company's employees it was successful. On the other hand, the Company came forward with considerable proof of the accessibility of its employees.

In *Central Hardware Co.* v. *NLRB,* 407 U.S. 539 (1972), this Court defined the limited access right given to union

organizers only "[a]fter the requisite need for access to the employer's property has been shown . . ." 33 L. Ed 2d at 127. This Court thus affirmed the traditional rule that the union must show "inaccessibility," rather than the employer being required to show that alternatives were available to the union. This rule was also applied by the Eighth Circuit in its opinion on remand, holding that the burden was not on the employer to show that conventional means of communication and access were open, but the contrary burden was on the Board. *Central Hardware* v. *NLRB,* 468 F.2d 252, 256 (8th Cir. 1972).

Conversely, the Trial Examiner's Decision, adopted by the Board and enforced by the Ninth Circuit, held that an employer may not deny a non-employee union organizer access to his private property "unless *other adequate channels of communication* with such workers are demonstrably available." (emphasis in original).

The Trial Examiner came up with several hypothetical objections to the demonstrated available alternatives, but such objections are adequately answered by the Eighth Circuit's statement that:

> "Doubtless solicitation on the parking lot was an easier approach to the employees than some of the other recognized means of union solicitation. However, this falls far short of meeting the Union's burden of establishing that no reasonable means of communication with the employees existed other than solicitation on the parking lot."

Central Hardware Co. v. *NLRB, supra,* at 255-56.

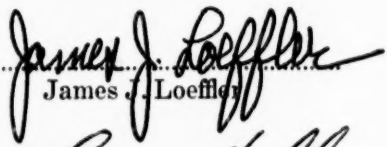
It is, therefore, submitted that the Trial Examiner, the Board and the Ninth Circuit erroneously placed upon the Company the burden of showing that its employees were accessible. If the burden were properly placed, it is entirely

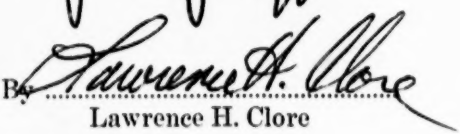
clear that there was no evidence presented that the Company's employees were not reasonably accessible and, in fact, the contrary was demonstrated. This is an important point in the interpretation of the Act and one presented in the Petition filed by Scholle Chemical Corporation et al in No. 73-66 presently before this Court. The improper placement of the burden has the outrageous result of, in effect, creating a presumptive right to access to private property in clear contradiction of this Court's holding in *Babcock & Wilcox.*

CONCLUSION

For the reasons set forth above, a Writ of Certiorari should issue to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

By 
James J. Loeffler

By 
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CERTIFICATE OF SERVICE

I, James J. Loeffler, Attorney for Alaska Barite Company, do hereby certify that on this the 27th day of August, 1973 copies of the foregoing Petition for Writ of Certiorari have been served on the following:

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by mailing the same to them through the United States mail, postage prepaid.

James J. Loeffler

JAMES J. LOEFFLER

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 72-2863
MEMORANDUM

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

ALASKA BARITE COMPANY,

Respondent.

[July 12, 1973]

On Application for Enforcement of an Order of the National Labor Relations Board

Before: BROWNING, ELY, and WALLACE, Circuit Judges

The case is before us on application of the National Labor Relations Board to enforce its order against respondent Alaska Barite Company.

The Board's finding that respondent denied access to its remote island mining site to a non-employee union representative shortly before a consent representation election is supported by substantial evidence on the record as a whole, and the Board's conclusion that this conduct violated section 8(a)(1) of the Act is justified by the rule announced in *NLRB* v. *Babcock & Wilcox*, 351 U.S. 105, 112-13 (1956).

The Board's order will be enforced.

APPENDIX B

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

CASE 19-CA-5325

ALASKA BARITE COMPANY
AND
LOCAL 302, INTERNATIONAL UNION
OF OPERATING ENGINEERS

DECISION AND ORDER

On March 31, 1972, Trial Examiner Maurice M. Miller issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the Trial Examiner's Decision in light of the exceptions and brief and has decided to affirm the Trial Examiner's rulings, findings, and conclusions and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Trial Examiner and hereby orders that the Respondent, Alaska Barite Company, Castle Island No. 2, near Petersburg, Alaska, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's recommended Order.

B-2

Dated, Washington, D. C. June 27, 1972.

John H. Fanning, Member
Ralph E. Kennedy, Member
John A. Penello, Member
NATIONAL LABOR RELATIONS BOARD

(SEAL)

APPENDIX C

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

DIVISION OF TRIAL EXAMINERS
BRANCH OFFICE
SAN FRANCISCO, CALIFORNIA

CASE NO. 19-CA-5325

ALASKA BARITE COMPANY
AND
LOCAL 302, INTERNATIONAL UNION
OF OPERATING ENGINEERS

Mr. Dale B. Cubbison, Portland, Ore.,
for the General Counsel.

Mr. James J. Loeffler, of *Fulbright, Crooker, Freeman, Bates and Jaworski*, and
Mr. Mink Matuszewski, of Houston, Tex.,
for Respondent.

DECISION OF THE TRIAL EXAMINER

Statement of the Case

MAURICE M. MILLER, Trial Examiner: Upon a charge filed June 23, 1971 and duly served, the General Counsel of the National Labor Relations Board has caused a Complaint and Notice of Hearing to be issued and served upon Alaska Barite Company, designated as Respondent within this decision.

(The Complaint, when drafted, designated Respondent as Dawson & Co., Inc., d/b/a Alaska Barite Company.

When the present hearing convened, Respondent's counsel reported that Dawson & Co., Inc., had, presumably, been a predecessor operator with respect to certain facilities currently maintained and worked by Respondent company. Pursuant to stipulation, the Complaint was, thereupon, amended; the references to Dawson & Co., Inc., were stricken therefrom.)

The Complaint issued August 5, 1971; therein, Respondent was charged with unfair labor practices affecting commerce within the meaning of Section 8(a)(1) of the National Labor Relations Act, as amended. 61 Stat. 136, 73 Stat. 519. Within Respondent's duly filed answer, certain factual statements in General Counsel's Complaint have been conceded; Respondent, however, has denied the commission of unfair labor practices.

Pursuant to notice, a hearing with respect to this matter was held at Sitka, Alaska, on October 28, 1971, before me. The General Counsel and Respondent were represented by counsel. Each party was afforded a full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence pertinent to the issues. Since the hearing's close, a brief has been received from Respondent's counsel; this brief has been duly considered.

FINDINGS OF FACT

Upon the entire testimonial record, documentary evidence received, and my observation of the witnesses, I make the following findings of fact:

I. Jurisdiction

Respondent raises no significant question, herein, with respect to General Counsel's jurisdictional claim. Upon the Complaint's relevant factual declarations, certain concessions set forth within Respondent's answer, and testimony

proffered without contradiction, I find that Respondent functions as a limited partnership, licensed to do business within the State of Alaska; that, throughout the period with which this case is concerned, Respondent was engaged at Castle Island No. 2, near Petersburg, Alaska, in the mining, processing and sale of crude barite ore; and that, during the last calendar year, Respondent's gross sales exceeded $500,000, with more than $50,000 of such sales made to customers located outside the State of Alaska. I find, further, that Respondent was, throughout the period with which this case is concerned, an employer within the meaning of Section 2(2) of the Act, engaged in commerce and business activities which affect commerce within the meaning of Section 2(6) and (7) of the Act, as amended. Further, with due regard for currently applicable jurisdictional standards, I find assertion of the Board's jurisdiction in this case warranted and necessary to effectuate statutory objectives.

II. The Labor Organization Involved

Local 302, International Union of Operating Engineers, designated as Complainant Union within this decision, is, and at all material times herein has been, a labor organization within the meaning of Section 2(5) of the Act, as amended, which admits certain of Respondent's employees to membership.

III. The Unfair Labor Practices

A. *Issue*

General Counsel's Complaint, herein, alleges that, on or about June 22, 1971, Complainant Union's representative sought personal contact with Respondent's Castle Island workers, on the island proper, for the purpose of soliciting their membership in Complainant Union and their votes in connection with a representation election which was to be

conducted shortly thereafter. General Counsel charges that, on and since that date, Respondent has — throughout the period with which this case is concerned — denied Complainant Union's representative reasonable access to company workers housed on Castle Island, for the purposes noted. Respondent's course of conduct — so General Counsel contends — should be considered interference with, restraint and coercion, directed to Respondent's employees, with respect to their exercise of rights statutorily guaranteed.

B. *Facts*

1. Background

Since some time in calendar year 1969, Respondent herein — functioning as the successor of several previous companies — has maintained and operated a facility for mining and processing barite (barium sulphate) dredged from some "underwater" deposits located near Castle Island No. 2; this small island stands within the Duncan Canal, a large fjord or sea inlet of Kupreanof Island, one of the major Southeastern Alaska islands. Petersburg, Alaska, the nearest sizable community — with a current population of slightly more than 2,000 persons — is located on a smaller island nearby.

Travel between Castle Island and Petersburg is possible by sea and air solely; the flight time — by chartered seaplane — approximates 10-15 minutes when direct flights are possible, but sometimes 20 minutes, while sea-borne trips by motor launch usually require something more than 45 minutes.

(Most seaplanes locally available for charter, so the record shows, seat four or five persons; charter rates for seaplanes, within Petersburg's vicinity, approximate $60 per hour of round trip flying time, plus stand-

by time charges under certain circumstances. No testimony regarding the availability, carrying capacity, or charter fee schedules of locally-based motor launches can be found within the present record.)

During the period with which this case is concerned, however, no regularly-scheduled transportation service, between Castle Island No. 2 and Petersburg, was provided; charter fees for seaplane flights approximated $36 per flight, with a lesser cost per person when more than one passenger was carried. Communications with Petersburg were maintained solely through a so-called "ship-to-shore" radio facility, which Respondent owned and operated, linked with a comparable Petersburg sending and receiving facility maintained by a local seaplane charter service.

On Castle Island No. 2, within a designated tract of land which Respondent holds partially under lease and partially pursuant to patent deed, several buildings have been constructed; these include buildings which contain sleeping quarters for Respondent's present crew complement, together with a recreation room, separate mess hall, living quarters for Respondent's resident manager, and various buildings utilized in connection with the firm's barite mining and processing operations.

(Respondent's workers — during their regular five-day work week—live on the island. Though "some" married workers may have homes in Petersburg, they normally return merely for three-night, two-day, weekends, weather permitting. Those without fixed Petersburg residences, likewise, normally repair to that community during their week-end free time only.)

So far as the record shows, the sole means of land access provided, for persons approaching or leaving the island, consists of a so-called "floating" dock constructed of planks laid flat over a number of sizable logs, linked together for

a distance of some 250 feet from the island's high water mark.

> (Such a floating dock — rather than a fixed dock set upon piles — is rendered necessary, so the record shows, because of significant tidal variations which affect the water level surrounding the island; differences between high tide and low tide levels some times measure twenty feet.)

With high tides, the entire 250-foot length of Respondent's dock will be found afloat; when the tide is low, however, no more than "the last couple of logs" will normally be water-borne.

2. Previous Visits by Complainant Union's Representative

Complainant Union's business representatives, Ferrall W. Campbell, maintains his residence and principal office in Juneau, Alaska, where the Union likewise maintains a dispatch hall. Campbell, so the record shows, has functioned for nineteen years as Complainant Union's sole field representative within Southeastern Alaska; periodically, he visits job sites, polices contracts, and services Union members, scattered "throughout the area" between Annette Island and Ketchikan, to the south, and Yakutat Bay, northwesterly. The distance between these widely-separated localities approximates 465 airline miles.

> (Southeastern Alaska has no significant highway system. Surface transportation between some of the larger communities can be procured through a state-operated ferry system; the ferries, however, maintain limited schedules.)

Within this territory, Complainant Union's business representative customarily travels between population centers

by scheduled airline whenever and wherever such service can be procured; when required to visit smaller, relatively isolated communities or job sites, however, he customarily charters locally-based plane services.

For some time — during calendar years 1969 and 1970 specifically — Respondent contracted out barite mining operations, successively, with two Southeastern Alaska contractors; Respondent's Castle Island crew, then, merely "processed" by crushing whatever crude ore was provided, preparatory to shipment. Both contractors — so Campbell's credible, uncontradicted, testimony shows, — were then privy to construction labor contracts with Complainant Union herein. While they were conducting mining and dredging operations for Respondent on Castle Island, pursuant to contract, Complainant Union's field representative visited their job site several times. Campbell's testimony regarding these periodic visits — which stands herein without contradiction — warrants a present determination that a surrogate for Respondent's resident manager — Robert Carnes, the firm's surveyor — was cognizant with respect to them, during 1970 particularly, but proffered no protest and imposed no restriction with respect to their timing or frequency. While a witness, Carnes declared himself "sure" that Plant Manager Dolph had, likewise, been aware with respect to Campbell's visits.

3. Complainant Union's Representation Petition

Some time during February, 1971, Campbell learned — so his testimony shows — that Respondent was no longer engaging a contractor to mine or dredge for barite; that Respondent — during the 1970-1971 winter season — had, itself, hired several of the workers previously engaged for such work by the most recently departed contractor; and that Respondent was currently "mining" with its own crew

complement. On Sunday, February 28th, while visiting Petersburg on union business, Campbell fortuitously discovered most of Respondent's Castle Island workers in town; Complainant Union's representative secured signed designation cards from some unspecified number.

> (Campbell testified — without contradiction — that, during the latter part of calendar year 1970, he had had some prior telephone "contacts" with one or more of Respondent's Castle Island workers while they were in Petersburg; during these conversations, the progress of Respondent's Castle Island work, generally, had been discussed.)

Shortly thereafter — on March 8th specifically — the field representative filed a representation petition in Complainant Union's behalf, (Case No. 19-RC-5750), seeking its certification as the collective bargaining representative for Respondent's Castle Island crew. The petition contained a declaration, *inter alia,* that recognition had been requested on March 1st previously; this request, so the record shows, had been made by letter. On March 17th, Respondent's counsel, James J. Loeffler replied; Campbell's request for immediate recognition and bargaining without a secret ballot election was denied. The Union representative was told, however, that, following counsel's receipt of some "pertinent" facts, arrangements for a consent election, without the necessity for a hearing, might be possible.

The present record, with regard to this petition's subsequent procedural history, contains few details. On April 28th, the Board's Regional Director issued a Notice of Representation Hearing with respect to Complainant Union's petition; the hearing date was set for May 11th at Ketchikan, Alaska. On the latter date, however, Respondent's counsel signed a Consent Election Agreement. Thereafter, on May 26th, Complainant Union's representative

signed. On June 3rd, the Board's Regional Director approved this agreement. On the same date, Respondent was requested to provide a list of eligible voters with their addresses by June 11th or prior thereto. A Notice of Election was prepared; the election was set for Friday, June 25th, between 3:00 and 4:00 p.m. specifically.

With a June 7th letter, Respondent's counsel dispatched two copies of the requested "Excelsior" list to the Board's Regional Director; therein, ten eligible employee-voters were listed. With respect to their addresses, various Petersburg, Alaska, post office boxes were shown.

> (Five of Respondent's Castle Island workers were listed as sharing P.O. Box 149; this group included Guadalupe Dolph, the wife of Respondent's Castle Island mining manager. The present record reflects a belief held by Complainant Union's representative — which Respondent's counsel and management representative have never challenged — that the designated post office box was held in Respondent's name.)

One copy of this list was, subsequently, forwarded to Complainant Union's representative; the record, however, does not show the precise date when it was received.

4. Complainant Union's Representative Contacts Respondent's Workers

During the morning of Monday, June 22nd, Campbell reached Petersburg; he promptly chartered a plane and proceeded to Castle Island, for the purpose of visiting with Respondent's workers during their lunch hour. Wallace Dolph, Respondent's mining manager — so Campbell testified — was "affable" regarding his visit; he met the Union representative's plane and invited him to share the workers' lunch.

> (Campbell, while a witness, declared — credibly and without contradiction — that, though he had not seen Dolph for some time, they had previously met. According to Campbell, Dolph had never — during his prior visits — directed him to leave the island.)

Complainant Union's representative introduced himself to three workers — listed on Respondent's newly tendered roster — whom he had not known previously. During a general lunch period conversation — with Mining Manager Dolph and Respondent's surveyor, Robert Carnes, present — the firm's workers were told that Campbell planned to return "after work that night" and each night thereafter, until the scheduled election day: —

> . . . so if they had any question about Local 302 and [the] benefits of a union shop, I would be able to tell them about it . . .

Campbell, so his corroborated testimony shows, merely "assumed" that he would be welcome; he did not — so I find — present Dolph with any "demand" for permission to return, but said merely that he "would like" to spend a "couple of hours" per night there, for the next three nights.

When the lunch hour ended, Dolph accompanied Campbell on his charter plane's return flight. According to Dolph, Campbell was told that he (Dolph) was going to call Respondent's counsel; Campbell could not recall any such declaration. Respondent's manager, however, did request Complainant Union's representative to "be sure to contact" him in town before returning to Respondent's camp that night.

Campbell, so he testified, could not locate Dolph in Petersburg during that day. When he proceeded to the headquarters of his charter plane service, however, he found Respondent's manager there. Regarding their conversa-

tion and subsequent developments, Complainant Union's representative testified — credibly and without significant contradiction — substantially as follows:

> He told me at this time, "on the [advice] of our headquarters — counsel, we are not letting you go back to the island," I was quite surprised because up to this particular time Mr. Dolph had been real neighborly, agreeable as employers go. He was, to my observation, quite visibly shook up by my visit out there and he was as nervous as a cat going back on the plane. When I was advised I couldn't go back to the island I didn't know what to do. We stalled around there in the airlines [office] for a while. Finally I told Mr. Dolph, "You have refused me going back and having access to the island. I promised those guys I would be out tonight. I'm going anyhow. If you tell me I can't go ashore, I'm not going to fight you, but I've got to make an appearance out there."

Campbell declared, initially, that he would stand on the plane's floats (pontoons) and wave. When their plane reached Castle Island, however, Dolph declared — responding to a request — that Campbell could stand on Respondent's floating dock; he stated, further, that he would tell Respondent's workers Campbell was "down there" so that — should any wish to speak with him — they could visit him there.

> (Dolph testified that he made this commitment before he and Campbell left Petersburg; my consideration of the complete record, coupled with my observation of both witnesses, has persuaded me that Campbell's recollection is more reliable.)

Campbell, therefore stood on Respondent's dock — sheltered by his plane's wing — while signaling Respondent's bunk house, directly to the right of the dock and some 100 yards up the bank. Respondent's mining manager — so credible testimony shows — did deliver his promised mes-

sage. Three of Respondent's ten workers, who were already Union members, came down to speak with Complainant Union's representative.

> (According to Campbell's unchallenged testimony, the weather was bad; it was "raining and blowing" throughout the period of his visit. The men spoke with him — so I find — no more than five or ten minutes; the testimony of Respondent's surveyor that Campbell remained standing on the unprotected dock between forty-five minutes and an hour and a half is rejected.)

Respondent's three "new" workers, however, did not come down. Campbell's testimony warrants a determination — which I make — that, throughout his stay, Dolph was sporadically visible "upon the bank" moving in and out of Respondent's bunk house.

Complainant Union's representative left some copies of Complainant Union's construction contract, which he requested his three contacts to distribute among their fellow workers. They said they would. They were told, further, that — since he had been denied access — he planned to return each night to see whether Respondent's attitude had changed.

The testimony of Respondent's surveyor — which I credit in this connection — warrants a determination that Campbell's three contacts did distribute his proffered Union material to some "members" and that the forthcoming vote was discussed.

During the evening of Wednesday, June 23rd Campbell did return. The weather was still bad. With respect to this second visit, Campbell's direct testimony — which I credit — reads as follows:

> I taxied up in the plane with just me and the pilot . . . I taxied up to the finger float and didn't make any effort

> to go ashore. I wasn't going to fight them. I got out on the float and some of the guys came to the door to see who was there and in a few minutes one of our members came down. I said, "Where's the other guys?" He said, "The other guys are in the bunk house." I asked if he had talked to any of the fellows and he said he didn't think they would come out in bad weather. I asked him to get the other guys to come down and talk. He went back and got two other members to come down . . . I told the guys [the three members who had come down the previous night] I was stumped . . . I said, "Without talking to the guys I can't tell what kind of a reception I'm going to have." . . .

Campbell could not recall whether he gave his worker contacts any Union literature on this occasion; the record will not warrant a factual determination that he did. While giving his direct testimony, Complainant Union's business representative purportedly recalled that Dolph had been visible "on the bank" while he (Campbell) was there. Subsequently, however, he could not recall whether Dolph had shown himself, but declared that he was "sure" Respondent's manager had been there.

> (During cross-examination, Respondent's surveyor recalled that — during a coffee-break conversation which he and Dolph had — the latter had declared that Campbell would be "coming out" Wednesday and Thursday, but would remain on Respondent's dock. I so find.)

While a witness, herein, Dolph conceded his knowledge with regard to Campbell's second visit; with due regard for the record, I conclude and find that Dolph was, indeed, aware of Campbell's presence on Respondent's floating dock.

5. Subsequent Developments

On Thursday, June 24th, Campbell telephoned Complainant Union's Seattle counsel; he reported the situation with

which he had been confronted, and requested that unfair labor practice charges be promptly filed. Later that day, Complainant Union's business representative was able to communicate, likewise, with the Board's field examiner — then temporarily working in Anchorage presumably. He reported that the present unfair labor practice charge had been filed. Field Examiner Perman suggested, then, that Campbell meet him in Petersburg when his plane arrived from Anchorage; his plane was scheduled to reach Petersburg on Friday, June 25th, shortly before noon.

Campbell, despite his previously declared purpose to visit Castle Island nightly, did not fly there Thursday night, though the weather had turned fair. While a witness, he testified that — since he had flown out twice and been denied access, he did not propose to make another trip with nothing "new" to communicate. In the meantime, however, Respondent's counsel — who had received Dolph's Tuesday afternoon, telephone call in Houston, Texas, while preparing to leave for Respondent's Castle Island facility — had reached the operation somewhat earlier that day. Regarding developments which followed his arrival, Manager Dolph testified as follows:

> I think when Mr. Loeffler came to the island, we discussed Ferrall's coming to the Island, and I told him he would be back on Thursday. At that time we decided if he came back to clean out the bunk [house] and let the employees go. Mr. Campbell didn't show up, so another discussion, we set up a time to have lunch with him at a time after dinner where he could meet with the employees and that's how it was arranged.

Loeffler, while a witness herein, confirmed this testimony. General Counsel's representative protested his proffered confirmation, contending that it was completely self-serving. The objection was overruled; my conclusion regarding

its probative weight, however, will be noted, subsequently, within this decision.

6. The Election

During the early morning hours of Friday, June 25th, Respondent's management — pursuant to Loeffler's suggestion — dispatched a radio telephone message, through the firm's Petersburg charter airline contact, directed to Complainant Union's representative. With respect thereto, Counsel Loeffler's testimony — which Dolph and Carnes corroborated generally, and which I credit — reads as follows:

> . . . we [Respondent's counsel and resident manager] determined we were going to ask an employee to call Mr. Campbell as soon as the radio was operating in the morning and, *on behalf of the company,* to invite Mr. Campbell to the island at the noon-hour lunch break, which was non-working time, to talk to the employees about the union or anything else he wanted to talk about, and that we would not be present . . . [This telephone call] was made by Mr. Carnes [Respondent's surveyor] at our request . . . Friday morning at 8 a.m., right after the radio became operative in the morning . . . The instructions to Mr. Carnes were that Mr. Carnes was to tell the operator to take down the message and to relay it to Mr. Campbell at the hotel and to await Mr. Campbell's reply. The message was that *Alaska Barite* requests, the *company* was inviting him out to the island to meet with the employees over lunch in the mess hall and to talk to them about the election or the union and that the company management and supervisors would not be present . . . Yes, Mr. Carnes gave the message to the operator. She acknowledged receipt of the message and told us to hold on while she contacted Mr. Ferral Campbell at the hotel . . . When she came back on, she said that Mr. Campbell had declined the invitation because he had to meet a plane that day. (Emphasis supplied).

Complainant Union's representative — who acknowledged receiving an invitation to come to Castle Island for lunch — conceded that he had chosen to remain in Petersburg because he had made arrangements to meet the Board's field examiner so that they could discuss the scheduled election. When the latter arrived, he reported that he had received instructions from the Board's Regional Director to conduct the scheduled election, but to impound whatever ballots were cast. The two men, thereupon, left for Castle Island. There, during the afternoon, the election was conducted as scheduled. All ten eligible voters (with Surveyor Carnes included) cast ballots. Pending this case's disposition, however, these ballots have not yet been counted.

C. *Analysis and Conclusions*

1. General Principles

The legal principles which control this case's disposition derive from well-established decisional doctrine. The Supreme Court has, already, delineated the fundamental test — within this field — whereby the right of non-employee union representatives to enter some employer's private property, for the purpose of discussing unionization with his workers, may be determined. *N.L.R.B.* v. *Babcock & Wilcox Co.*, 351 US 105. Therein, the Court did conclude, preliminarily, that — with respect to preserving their property rights — concerned employers may, ordinarily, bar non-employees from distributing union literature, and soliciting union membership on their property. Concurrently, however, the Court likewise noted that organizational rights are protected by law. Thus: —

> This is not a problem of always open or always closed doors for union organization on company property. Organizational rights are granted to workers by the same authority, the National Government, that pre-

> serves property rights. Accommodations between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other. The employer may not affirmatively interfere with organization; the union may not always insist that the employer aid organization. But when the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels the right to exclude from property has been required to yield to the extent needed to permit communication of information on the right to organize.

This Board, therefore, must — within each case presented for decision — balance the Union's necessity for "direct access" to concerned employees against the employer's "right to control" over his own property and any "detriment" which might result from the admission to that property of union organizers. *N.L.R.B.* v. *S. & H. Grossinger's Inc.*, 372 F. 2d 26, 29 (C.A. 2). When striking such a balance, further, this Board may properly conclude that — whenever the location of a particular facility, within which living quarters for workers have been provided, places such workers beyond the reach of reasonable union efforts to communicate with them — concerned employers must permit union representatives to approach employees on their property. *N.L.R.B.* v. *Babcock & Wilcox Co., supra;* see pp. 112-113 specifically.

Consistently with these principles, this Board has, with judicial concurrence, laid down a rule that — absent legitimate business considerations — employers who house employees within their premises may not deny union representatives direct, personal access to such premises, for the purpose of discussing unionism with the workers concerned, unless *other adequate channels of communication* with such workers are demonstrably available.

We are, therefore, confronted herein with a narrow question: Whether, with due regard for those facts which have been developed within the present record, Complainant Union's representative was really granted "adequate opportunity" to communicate with Respondent's Castle Island workers, despite management's refusal to grant him full rights of access with respect to Respondent's land-based facility, during a crucial period preceding the scheduled representation vote. For various reasons, which I propose to discuss hereinafter, I find and conclude that — with due regard for the total situation herein presented — the limited "access" rights which Respondent's management granted Complainant Union's representative did not afford him a reasonable opportunity to communicate with Respondent's workers, within the *Babcock & Wilcox* rule.

2. Respondent's Contentions

Within his brief, Respondent's counsel contends that four factual conditions precedent must be satisfied before any so-called "legal right to access" can rightly be claimed. First, counsel suggests:

> There must be a remote physical situs, where the employees spend almost all of their time, and thereby the employees become inaccessible to the union.

He then declares, however, that General Counsel has "totally failed to meet his burden" with respect to this requirement. Presumably, Respondent's counsel refers to record testimony that his client's Castle Island facility is located within 10-20 minutes flying time from Petersburg; that some of the firm's workers — possibly five in number — maintain residence there; that these workers, plus those who do not maintain such residence, spend "many of their weekends" there; that the firm's workers are likewise free to visit

Petersburg on week nights; that one worker owns a plane which he berths — during the work week — at Respondent's facility; and that charter plane service can be procured for travel into town, following work, during the week and on weekends. This testimony — within my view — cannot be considered sufficient, however, to foreclose a determination that Respondent's Castle Island facility constitutes a remote physical situs. Compare *N.L.R.B.* v. *Stowe Spinning Company,* 336 U.S. 226, 230; *N.L.R.B* v. *Lake Superior Lumber Corporation,* 167 F.2d 147, 148 (C.A. 6), enf'g 70 NLRB 178; *N.L.R.B.* v. *S. & H. Grossinger's, Inc.,* 372 F.2d 26, 29 (C.A. 2), enf'g 156 NLRB 233; *Sioux City and New Orleans Barge Lines, Inc.,* 193 NLRB No. 55 (Slip Opinion, TXD, pp. 3-4, 11); *Tamiment, Inc.,* 180 NLRB 1074, 1075; *Kutsher's Hotel & Country Club, Inc.,* 175 NLRB 1114, 1115. For Respondent's ten Castle Island workers, travel into town, though feasible, clearly requires something more than a negligible expenditure of time and money; the likelihood that — with respect to any given date — the Complainant Union's representative would find a significant number of Respondent's workers "accessible" without personally visiting their Castle Island camp merits characterization as minimal.

Secondly, Respondent contends, *inter alia,* that Complainant Union's representative could not, properly, demand "legal rights of access" with respect to Respondent's property, since General Counsel's presentation will not — so counsel claims — support a so-called condition precedent determination that he had, actually, made "reasonable efforts to communicate with [Respondent's] workers through alternative means and arrangements" which could have been followed. Compare *N.L.R.B.* v. *Tamiment, Inc.,* 78 LRRM 2726, 2729, (C.A. 3), enf. den. for 180 NLRB 1074, (Petition for Rehearing filed December, 1971), in this connection.

Specifically, Respondent cites Campbell's several concessions: (1) That he made no effort to meet personally with Respondent's Castle Island workers, jointly or severally — while they were visiting Petersburg between February 28th and June 22nd specifically — despite several telephone calls which he received — while in Juneau, Alaska, his official headquarters — from "one or two" workers suggesting that Complainant Union's presumptive majority support, previously demonstrated, might prove to have been eroded; (2) that he likewise made no effort, during the period noted, to communicate with Respondent's workers through letter correspondence, through the firm's so-called "ship-to-shore" radio communications link; or through newspaper advertisements; (3) that he did not, preliminarily, solicit a confirmation, from either the firm's resident manager or company counsel, regarding his presumed "right of access" with respect to Respondent's Castle Island facility, during the period in question; (4) that he made no effort to determine — before abandoning his planned Thursday evening, July 24th, visit — whether Respondent's management would persist in denying his claimed access rights, or whether the firm's resident manager and counsel were then prepared to abandon their previously declared position; and (5) that he failed to proffer a favorable reply when these management representatives tendered a specific invitation, suggesting that he would be permitted to confer with Respondent's Castle Island workers shortly before their scheduled representation vote.

Despite these testimonial concessions, chargeable to Complainant Union's representative, Respondent's contention that they necessarily foreclose any present determination supportive of claimed "access" rights cannot be considered persuasive; that contention reflects too narrow a construction of the Supreme Court's determinative *Bab-*

cock & Wilcox decision. Substantially, the firm's counsel seeks a Board determination — consistent with the Third Circuit's *Tamiment* decision, previously noted — that "only after the union has made a showing that it *used reasonable efforts* to utilize other available channels of communication" may rights of access with respect to Respondent's premises be considered warranted. Counsel's suggestion — should this Board be persuaded to concur — would require unions, when they mount organizational campaigns, both to *explore* and to *exhaust* nearly every possible alternative method for contacting employees before direct access could be considered permitted, even though the workers concerned may be either constructively or literally "insulated" from the most effective method of communication — personal contact with the union's organizers — and even though the possible alternative methods would be patently ineffective. Such a result would serve no practical need, and would — within my view — place an unreasonable impediment on statutorily-guaranteed rights.

The Supreme Court has, of course, drawn a distinction— within its *Babcock & Wilcox* decision—between the respective rights of workers and nonemployees, defined by the statute, to conduct organizational activity on some concerned employer's premises. While confirming such rights for employees, the Court held, generally, that employers may validly post their property against some non-employee's distribution of union literature whenever the situation presented renders it likely that reasonable efforts by the union, through other available channels of communications, will enable it to reach concerned workers with its message. Within the factual context which *Babcock & Wilcox* presented, several examples of "other available channels of communication" were mentioned. 351 U.S. 105, 107, n. 1, 111, 113. The Court did note, however, one particular

situation wherein these so-called other channels would not really be "available" to reach employees. Citing *N.L.R.B.* v. *Lake Superior Lumber Co.*, 167 F.2d 147, 148, 151, 152 (C.A. 6) which involved employees living and working within an isolated lumber camp, plus its own prior statements within *Republic Aviation Corporation* v. *N.L.R.B.*, 324 U.S. 793, 798-799, the Court declared that its general rule permitting employers to deny access would not apply whenever "the location of a plant and the living quarters of the employees" place the latter "beyond the reach of reasonable union efforts to communicate" with them; such employees were characterized as geographically "isolated from normal contacts" such as "on streets or at home, [or by] telephone, letters or advertised meetings" and their "inaccessability" was described as sufficient to render "ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels." 351 U.S. at 111, 112, 113. These comments demonstrate, clearly, that — for the Supreme Court particularly — the overriding consideration, when questions of nonemployee access rights are presented, should be the "availability of other channels" which would permit effective communication with the employees; further — at least within the factual context presented by those cases which the Court's decision cites — some evidentiary showing that concerned employees are physically "isolated from normal contacts" with union organizers will be considered dispositive, within the Court's view, with respect to determining the realistic "availability" of such "other" channels.

Several courts have recognized that the only really "effective" way for union organizers to communicate with employees is by personal contact. The Supreme Court — within its *Babcock & Wilcox* decision — presumably concurs, since it notes that when workers, like those in the

Lake Superior case, both live and work on their employer's premises, there simply is no opportunity for the union to make a personal contact with employees — separated from its representatives, as they are, by physical barriers which the employer alone controls. In such cases, therefore, the employees' physical "inaccessability" *itself*: —

> . . . makes ineffective the reasonable attempts by non-employees to communicate with them . . . [and therefore] the right to exclude from property [must] yield to the extent needed to permit communication of information on the right to organize . . .

In *S. & H. Grossinger's Inc.*, 156 NLRB 233, 247-265, enf'd. 372 F. 2d 26, 29-30 (C.A. 2), this Board, with Court approval, applied these principles, and found that access was required in a case involving a resort hotel, when the record showed that some 60% of the concerned employer's workers resided on the hotel property and only *rarely* left the premises for *brief* periods. The court, sustaining the Board's conclusion, noted specifically that the majority of the workers lived on their employer's premises and could not be reached by any means practically available to union organizers.

With matters in this posture, counsel's suggestion that this Board should now impose a further requirement — that Complainant Union must actually *seek out* and *exhaust* every alternative method of communication before it can claim entitlement to access — cannot be considered well founded in law or policy. The language which the Supreme Court used within its *Babcock & Wilcox* decision, together with the result reached, both indicate that the physical isolation of the concerned workers from personal contact with the union's organizer will constitute the determinative factor. Moreover, the Court's decision clearly shows that it would ascertain the presence or absence of this

factor, within the particular situation with which it may be confronted, solely through a consideration of the objective facts of geographical placement, without regard to the union's success or lack of success in actually communicating with employees. Respondent's counsel, therefore, cannot herein contend — persuasively — that the Supreme Court's reference to "reasonable attempts" by the union therein to reach employees should be taken to mean that Complainant Union herein must show that it really "attempted" some alternative means to reach Respondent's Castle Island workers, when, from an objective standpoint, they were — for all practical purposes — physically unreachable. Rather, this Board's basic consideration must be whether, with due regard for the physical circumstances, Complainant Union has really had "opportunities" for "effective" personal contact, not whether it has or has not made use of some opportunities for communication which may have been available.

To recapitulate: Nothing within the Supreme Court's *Babcock & Wilcox* decision suggests that unions must be required to prove available alternatives inadequate, where the "location of a plant and the living quarters of the employees" themselves show that such workers are "beyond the reach of reasonable union efforts" to communicate with them. To require a labor organization's representative, nonetheless, to seek contact with the concerned workers in some other manner would be to dictate little more than a futile gesture, which would serve no constructive purpose, but would, rather, require the expenditure of considerable time, effort and resources, merely to confirm what should be clear from the objective facts — that such other methods of communication provide "no substitute for face to face contact" within a relaxed atmosphere, and must be considered, therefore, ineffective.

This construction — regarding the legal doctrine which must be considered determinative herein — has, comparatively recently, received specific Board sanction. *Monogram Models, Inc.*, 192 NLRB No. 99 (Slip Opinion p. 8, n. 7), 77 LRRM 1913, 1915. Therein, this Board stated: —

> . . . we do not believe that the critical issue in this case hinges on the question whether the Union, did, in fact, make a "reasonable effort" to reach these employees. Whether or not such an effort was made, it is the opportunity to make such an effort because of "the location of the plant and the living quarters of the employees" which is determinative of the Union's right to approach the employer's employees on his property . . .

Previously, the Board had, without qualification, confirmed statements within a Trial Examiner's decision carrying comparable thrust. *S. & H. Grossinger's Inc., supra,* p. 259. Further, no court decision — save the Third Circuit's, previously noted — has rejected the Board's construction; to the contrary, the Second Circuit's enforcement of this Board's order with respect to *Grossinger's* specifically, necessarily reflects its implied concurrence with respect to the Board's position.

> (Through a subsequent Second Circuit decision — *N.L.R.B.* v. *Kutsher's Hotel and Country Club, Inc.*, 427 F. 2d 200 (C.A. 2) — did rely in part on a finding that the Union there made "scant . . . efforts" to organize the employees, that finding was coupled with another determination that the physical location of the employees was *not* such as to represent a barrier to communication. The Court, therefore, was determining — realistically — that, unlike *Grossinger's* workers, Kutsher's employees were not really physically "isolated from normal contact" and that an *opportunity* for personal contact *was* present which the Union should have used more extensively. The Court, thereby,

necessarily reaffirmed its prior *Grossinger's* determination, that "opportunity for access to the employees" must be considered the decisive factor, with respect to cases like the present one.)

With matters in this posture, Respondent's contention — that Campbell must be shown to have "utilized" various alternative methods for communicating with concerned workers, herein, before his claim for "access" rights could be considered meritorious — must be rejected as contrary to law.

Thirdly, Respondent contends there must be some showing that various "alternate, available means of contact and/or communication" with Respondent's workers were clearly inadequate. Previously within this decision, however, we have noted the Supreme Court's recognition that "personal contacts on streets or at home, [or by] telephones, letters or advertised meetings" would be clearly inadequate with respect to workers "isolated" from normal contacts. However, should a determination be considered warranted, *arguendo,* that some showing — calculated to reveal the inadequacy of various alternative methods of communication — must be made herein, before Complainant Union's claimed "access" right can be considered validated, such a showing has, within my view, been made. Cf. *N.L.R.B.* v. *United Aircraft Corporation,* 324 F. 2d 128, 130, (C.A. 2), quoted in *N.L.R.B.* v. *S & H. Grossinger's Inc., supra.* Therein, the Second Circuit noted that:

> The predictable alternatives [to personal contacts] bear without exception the flaws of greater expense and effort, and a lower degree of effectiveness.

For example: Mailed material, generally, would have carried minimal impact; further, Complainant Union's representative could never have been certain that whatever

material he may have mailed would prove to have been realistically directed toward its recipient's real or primary concerns. Communication *via* the firm's so-called "ship-to-shore" radio clearly could not compare with personal solicitation, particularly so far as workers not personally familiar with Campbell were concerned; further such communications could not have been maintained freely, since the possible presence of management representatives, gathered before the radio with a group of Castle Island workers, could not have been foreclosed. Communication through newspaper advertisements would necessarily have been limited by virtue of space and cost considerations; further, the likelihood that any given advertisement, — within a particular newspaper — would reach Respondent's workers could not be guaranteed. See, also, Bok, "The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act," 78 *Harvard Law Review*, 38, 95-96; Broomfield, "Preemptive Federal Jurisdiction over Concerted Trespassory Union Activity," 83 *Harvard Law Review* 552, 553, 573-574. With matters in this posture, counsel's third so-called "condition precedent" has, within my view, been satisfied.

Fourthly, Respondent's counsel contends that there must be shown some request for "reasonable contact and/or communication" with employees, which request has been denied. Suggesting, once more, that General Counsel's representative has "totally failed to meet his burden" with respect to this claimed condition precedent, counsel contends, alternatively, that:

> . . . even though the Union had absolutely no right to access to private property, it is abundantly clear that the Union representative was not denied access and, in fact, was afforded far more access than either he secondarily demanded or subsequently utilized.

Within this case's context, of course, some "request" to visit Respondent's Castle Island facility, followed by that request's denial, must be shown. Without such a record showing, no question determinable by reference to the statute would be presented. The present record, however, will fully warrant a determination that Campbell did proffer the necessary "request" which Respondent's resident manager — following advice from his counsel — thereafter denied.

Within his brief, Respondent's counsel has called Campbell's June 22nd statements and conduct "brash, arrogant and commandeering" while declaring further that the Union representative's declaration of purpose to visit Castle Island three times before the scheduled representation vote constituted his "last-minute, arrogant and unreasonable" demand. With due regard for the record considered in totality, however, I find such strong language hyperbolical. Clearly, Complainant Union's representative — recalling the toleration with which Respondent's management representatives had received him during prior visits — felt himself free to presume that his planned visitations would be similarly viewed, with no prior "arrangement" necessary. His mildly-stated declaration of purpose, therefore, constituted his request; I so find.

(Respondent's counsel currently claims that Campbell was demanding "complete access to the Company's entire island facilities two (2) hours each night for the last three (3) nights" before the scheduled representation vote. Previously, however, I have found that Complainant Union's representative did not specify the number of hours he proposed to stay nightly. The record, further, warrants a determination that he merely proposed to discuss unionization with Respondent's workers within their bunk house or recreation room.)

Conceding that Respondent's management had denied Campbell's first "access" request, counsel contends — nevertheless — that Mining Manager Dolph subsequently granted Campbell's so-called "second demand for access" giving him "more access" than his so-called "counter-proposal or second request" sought. This contention, however, misconstrues the record. Complainant Union's representative did not, really, voluntarily declare some alternative desire to stand on Respondent's floating dock for a time each night before the election, to talk with the ten eligible voters; he declared his purpose, merely, to stand on his charter plane's pontoon and wave, so that Respondent's workers would know he had tried. Respondent's resident manager — so I have found — was thereupon responsible for relaxing his previously — declared total "access" ban; Dolph volunteered the suggestion that Campbell could stand on Respondent's dock, and further volunteered to tell Respondent's workers that Complainant Union's representative was there. With due regard for the context within which Dolph's seeming concession was made, however, I find it less than sufficient to provide that "reasonable access" which the relevant decisions command. Compare *N.L.R.B.* v. *Lake Superior Lumber Company, supra*, at pp. 151-152 particularly, in this connection. Conversations conducted on movable "floating" platforms, while their participants stand exposed to wind and rain, can hardly be considered conversations maintained within the relaxed atmosphere which the relevant case law optimally requires.

Further, however, counsel cites Respondent's Friday morning communication, whereby Campbell was invited to join Respondent's Castle Island workers for lunch, there to discuss unionization with them — some three hours before their scheduled representation vote — without management representatives present. This suggestion, within my

view, reflected nothing more than Respondent's tardy recognition that its previously-declared position might be considered unreasonably restrictive. Campbell's situation — with due regard for his prior commitment to meet preliminarily with the Regional Office's field examiner, then due in Petersburg shortly — necessarily rendered Respondent's invitation futile. Further, Respondent's suggestion, herein, that such a last-minute visit — during which Complainant Union's representative would necessarily have nothing more than a rather limited opportunity to discuss the benefits of unionism — would constitute "reasonable access" must be rejected. Within their total context, Respondent's proffers — so I find — were "too little and too late" to satisfy statutory requirements.

Respondent suggests that — had Campbell flown to Castle Island Thursday evening pursuant to his previously declared plan — he would have found the firm's management prepared to grant him timely "access" with respect to bunk house and recreation room facilities. However, this suggestion — within my view — reflects *post hoc* rationalization, merely. Counsel Loeffler's testimony that the firm's decision to grant Campbell land-based visitation rights Thursday evening had been reached earlier that day — following his Castle Island arrival — has been credited. Since Dolph, pursuant to his suggestion, had, however, been responsible for the firm's prior decision to ban Complainant Union's representative, responsibility to communicate Respondent's change of policy with respect thereto was necessarily theirs. And assuming, *arguendo*, that Loeffler and Dolph had reached their reconsidered decision some time before the post-dinner hour when Campbell's previously-projected visit could reasonably have been expected, I find no rational explanation proffered, within the present record, for their failure to communicate that decision, beforehand, to Complainant Union's representative.

(The particular "assumption" seems fully warranted. Dolph could not recall whether Respondent's counsel had reached Castle Island Wednesday or Thursday; Loeffler's testimony, however, will support a conclusion that he reached Respondent's facility during Thursday's daylight hours.)

With due regard for the circumstances herein present, therefore, Complainant Union's representative — twice frustrated previously — cannot, within my view, be faulted for his decision not to make a flying trip which, so far as he knew, would merely constitute a costly, futile gesture.

Finally, Respondent contends that Campbell's June 22nd request to visit Castle Island several successive times was properly deemed "unreasonable and unneeded" with due regard for the circumstances. In this connection, counsel cites: (1) the Union representative's conceded failure to seek direct, personal contact with Respondent's workers between February 28th and the week within which their representation vote was scheduled; (2) his conceded failure to request "access" rights before his final Petersburg visit; (3) his conceded failure to seek prior communication with those workers, designated on Respondent's previously-provided *Excelsior* list, whom he considered strangers; and (4) his decision not to discuss unionization during his June 22nd lunch hour visit, with Manager Dolph present. Substantially, Respondent's counsel — when he thus recapitulates Campbell's several purported failures — presumes to censure Complainant Union's representative for laches; the consensual decision which Loeffler and Dolph first reached, to foreclose completely further face-to-face contacts between Respondent's Castle Island workers and Complainant Union's representative should be considered justified — so counsel suggests — merely because Campbell's "last-minute" request did not *deserve* consideration.

(Within his brief, counsel has characterized Campbell's proffered reasons for his failure to seek more communication with Respondent's workers, between February 28th and June 22nd specifically, as "feeble" rationalizations. With due regard, however, for Campbell's situation as Complainant Union's sole Southeastern Alaska representative—plus his presumptive expertise with regard to conducting organizational campaigns—his proffered justifications cannot be thus cavalierly dismissed.)

Previously, the Union representative's testimonial concessions have been found lacking in persuasive relevance, when proffered in support of Respondent's contention that Campbell's several conceded failures should be considered sufficient to defeat his "legal right to access" claim. Within my view, they likewise carry no persuasive thrust when proffered in support of Respondent's further contention that Campbell's June 22nd request merited rejection as both unreasonable and unnecessary. This Board need not—with due regard for relevant case law — balance, herein, Complainant Union's necessity for direct personal access to Respondent's concerned workers against particular "errors of omission" described as sufficient to constitute laches. Rather, Complainant Union's claim of necessity must be balanced against Respondent's "right to control" over its property and any "detriment" which might result from the admission of union organizers. *N.L.R.B.* v. *S. & H. Grossinger's Inc., supra.* Save for a brief, *ipse dixit,* claim that Campbell's projected visit would have "disrupted" Respondent's Castle Island operations, however, the firm has proffered no proof whatsoever that such visits would have been detrimental.

3. Conclusions

With matters in this posture, I find merit in General Counsel's contention that Respondent herein — since June

22, 1971 particularly — has denied Complainant Union's representative reasonable access to its workers housed on Castle Island, for the purpose of soliciting their membership in Complainant Union and their votes in connection with a scheduled representation election. And Respondent's course of conduct — so I find — interfered with, restrained and coerced its employees, with respect to their exercise of rights statutorily guaranteed.

IV. The Effect of the Unfair Labor Practices Upon Commerce

Respondent's course of conduct set forth in Section III above — since it occurred in connection with Respondent's business operations set forth in Section I above — had, and continues to have, a close, intimate, and substantial relation to trade, traffic and commerce among the several states; absent correction, such conduct would tend to lead to labor disputes burdening and obstructing commerce, and the free flow of commerce.

V. The Remedy

Since I have found that Respondent engaged, and continues to engage, in certain unfair labor practices which affect commerce, I shall recommend that it be ordered to cease and desist therefrom, and to take certain affirmative action, including the posting of appropriate notices, designed to effectuate the policies of the Act, as amended.

CONCLUSIONS OF LAW

In the light of these findings of fact, and upon the entire record in this case, I make the following conclusions of law:

1. Respondent, Alaska Barite Company, is an employer engaged in commerce, and business operations which affect commerce, within the meaning of Section 2(2) and Section 2(6) and (7) of the Act, as amended.

2. Local 302, International Union of Operating Engineers, is a labor organization within the meaning of Section 2(5) of the Act, as amended, which admits certain employees of Respondent to membership.

3. By denying Complainant Union's field representative access to Castle Island proper, for the purpose of soliciting employees during their free time on behalf of that labor organization, and for the purpose of otherwise communicating with such employees concerning organizational matters, Respondent has interfered with, restrained and coerced employees with respect to their exercise of rights which Section 7 of the statute guarantees. Thereby, Respondent has engaged in, and is engaging in, unfair labor practices affecting commerce, within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act, as amended.

* * * * *

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[1]

Respondent, Alaska Barite Company, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Continuing or giving effect to policies or company rules pursuant to which Union representatives have been

[1] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and Recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

denied access to company workers on company premises or within employee facilities on Castle Island proper, for the purpose of soliciting them during their free time on behalf of any labor organization, or for the purpose of consulting, conferring, advising, assisting, or otherwise communicating with them during their free time, in regard to their statutorily-guaranteed right of self-organization; provided, however, that nothing herein contained shall be construed to prohibit Respondent from making and enforcing reasonable regulations with respect to the timing and frequency of visits by such non-employee Union representatives;

(b) In any like or related manner, interfering with, restraining or coercing its employees with respect to their exercise of rights which Section 7 of the statute guarantees.

2. Take the following affirmative action, which is necessary to effectuate the policies of the Act, as amended:

(a) If requested by Local 302, International Union of Operating Engineers, grant Union representatives access rights to company premises and employee facilities thereon, for the purpose of distributing Union literature, soliciting Union membership, or for the purpose of consulting, conferring, advising, assisting, or otherwise communicating with employees on Castle Island proper, during their free time, subject only to reasonable regulations concerned with the timing and frequency of such visits;

(b) Post, within its facility on Castle Island No. 2 near Petersburg, Alaska, copies of the notice attached to this decision as an Appendix.[2] Copies of the notice, on forms

[2] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

provided by the Regional Director for the 19th Region, as the Board's agent, shall be posted immediately upon their receipt, after being duly signed by Respondent's representative. Once posted, they shall remain posted for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that such notices are not altered, defaced, or covered by any other material;

(c) File with the Regional Director for the 19th Region, as the Board's agent, within 20 days from the date of service of this Trial Examiner's decision, a written statement setting forth the manner and form in which it has complied with these recommendations.[3]

Dated: March 31, 1972

s/ MAURICE M. MILLER
Maurice M. Miller
Trial Examiner

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[3] In the event that this Recommended Order is adopted by the Board after exceptions have been filed, this provision shall be modified to read: "Notify the Regional Director for Region 19, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith."

APPENDIX A
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing, during which all parties were given an opportunity to present evidence and argument, it has been determined that we violated the law by committing certain unfair labor practices. In order to remedy such conduct, we are being required to post this notice. We intend to comply with this requirement, and to abide by the following commitments.

WE WILL, subject to reasonable rules and regulations, permit Union organizers not employed by us to visit our premises and employee facilities on Castle Island No. 2, for the purpose of soliciting our employees, during their free time, on behalf of a union, or for the purpose of consulting, conferring, advising, assisting, or otherwise communicating with our employees, during their free time, in regard to their statutorily-guaranteed rights to seek self-organization, to form, join or assist a labor organization, to bargain collectively through representatives of their choice, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection.

All our employees are free to become or remain, or to refrain from becoming or remaining members of Local 302, International Union of Operating Engineers, or any other labor organization.

ALASKA BARITE COMPANY
(Employer)

By '.....
(Representative) (Title)

Dated .....

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Republic Building, 10th Floor, 1511 Third Avenue, Seattle, Washington 98101. Telephone No: (206) 442-5692.

APPENDIX B

My review of the record, herein, has revealed several transcription errors. Correction of the record with respect to these matters will be necessary, within my view, to render the transcript more accurate and comprehensible. The corrections, listed below, therefore, are hereby ordered.

Corrections

Page	Line	Reads	Should Read
35	22	voice	advice
59	11	plans, that	plans, say that
66	16	revision plan	pension plan
75	2	you could	He could
160	13	employees for some reason	employees or for some reason
168	2	if is not grounds	it is not grounds
168	2	returning	overturning

s/ MAURICE M. MILLER
Maurice M. Miller
Trial Examiner

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In the Supreme Court of the United States

OCTOBER TERM, 1973

ALASKA BARITE COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

PETER G. NASH,
General Counsel,
JOHN S. IRVING,
Deputy General Counsel,
PATRICK HARDIN,
Associate General Counsel,
NORTON J. COME,
Deputy Associate General Counsel,
LINDA SHER,
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National Labor Relations Board,
Washington, D.C. 20570.

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OPINIONS BELOW

The memorandum opinion of the court of appeals (Pet. App. A-1) is not officially reported. The decision and order of the National Labor Relations Board (Pet. App. B1-B2, C1-C39) are reported at 197 NLRB No. 170.

JURISDICTION

The judgment of the court of appeals was entered on July 12, 1973. The petition for a writ of certiorari was filed on August 29, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that a non-employee union organizer was entitled to access to company property because, in the circum-

stances of this case, there were no other effective means of communicating with the employees.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act are set forth at Pet. 3-4.

STATEMENT

1. Petitioner operates a facility for mining and processing barite on Castle Island No. 2, a small island off the southeastern coast of Alaska. The nearest sizeable community, Petersburg, is on another small island nearby and has a population of slightly more than 2,000 (Pet. App. C4; Tr. 18, 19, 23-24, 27, 146).[1] There is no regularly scheduled transportation service between Castle Island and Petersburg, but the trip can be made by chartered seaplane or motor launch. A one-way flight normally takes 10 to 20 minutes, and the per person cost is approximately $36, with a lesser cost when more than one paying passenger is carried (Pet. App. C4-C5; Tr. 17-20, 41, 75).[2] Castle Island maintains communications with Petersburg solely through a "ship-to-shore" radio facility, which the Company owns and operates (Pet. App. C5; Tr. 31, 100, 106).

On the Company's property on Castle Island there are, in addition to the various buildings used in its mining and processing operations, sleeping quarters

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[1] "Tr." refers to the transcript of the hearing before the Trial Examiner. A copy has been lodged with this Court.

[2] Most charter planes can seat four or five persons. There is no record evidence as to the availability, cost, or use of motor launches. The trip takes 45 minutes by boat (Pet. App. C4-C5; Tr. 17-19).

for the working crew, a recreation room, a mess hall, and living quarters for the resident manager (Pet. App. C5; Tr. 40). The employees live on the island during their regular five-day work week. About half of the employees are married and maintain homes in Petersburg; they return home on weekends, weather permitting. Those without fixed Petersburg residences may also spend their weekend free time in Petersburg (Pet. App. C5; Tr. 28, 93, 120).

During 1969 and 1970, the Company contracted out its mining operations, using its own employees only for processing. The mining contractors had bargaining agreements with Local 302, International Union of Operating Engineers (Pet. App. C7; Tr. 23-26). During this period, the Union's field representative, Ferral Campbell,[3] visited the Castle Island jobsite several times. No Company official protested or imposed restrictions concerning the frequency, timing, or sites of his visits (Pet. App. C7; Tr. 23-26, 33, 121-122, 124).[4]

In February 1971, Campbell learned that the Company was no longer contracting out its work but had com-

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[3] Campbell has for 19 years been the sole field representative for the Union in Southeastern Alaska. He operates out of the Union's main office in Juneau, Alaska, and periodically visits jobsites—to police contracts and service union members—located in widely-separated localities covering an area of approximately 465 airline miles. This area has no significant highway system and only a limited-schedule ferry system. In his work, Campbell customarily uses scheduled airlines where available, and charter carriers in more isolated community jobsites (Pet. App. C6-C7; Tr. 14-18).

[4] There are no Company rules denying visitors access to the island as such. The manager, Wallace Dolph, has only barred a "boatload of kids" and some "hunters" who had been "drinking." Most visitors arrive unannounced and are prevented only from wandering into the equipment area (Tr. 122-123, 141-143).

menced mining operations on its own and had hired some of the previous contractors' employees. On Sunday, February 28, while visiting Petersburg on business, Campbell secured signed authorization cards from a number of employees (Pet. App. C7-C8; Tr. 29).[5] On March 8, the Union petitioned the Board for a representation election. The Board ordered an election to be held on Friday, June 25, between 3:00 and 4:00 p.m. (Pet. App. C8-C9).

On Tuesday, June 22, Campbell flew to Petersburg and chartered a plane to visit Castle Island during the employees' lunch time. Company Manager Wallace Dolph "affabl[y]" greeted Campbell on the island and invited him to lunch (Pet. App. C9; Tr. 33). Campbell introduced himself to three workers he had not known previously. He ate lunch with the employees, Manager Dolph, and Robert Carnes, the Company's surveyor. Campbell told the employees that he planned to return after work that night and each night thereafter until the day of the election, in order to answer questions about the Union and the benefits of a union shop (Pet. App. C10; Tr. 34), and he told Dolph that he would like to spend a couple of hours per night there, for the next three nights (Pet. App. C10; Tr. 59).

After lunch, Dolph accompanied Campbell on his charter flight back to Petersburg. Dolph told Campbell to "contact" him in town before returning to the island. That evening, Dolph met Campbell at the charter plane service, and told him that, "on the [advice] of our headquarters-counsel, we are not letting you go back on the island"; according to Dolph, prior to the conversation with his attorney, he had had no objection

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[5] There were ten employees in the bargaining unit (Pet. App. C16).

to Campbell's suggested visits to the island as no Company rule would have denied Campbell access (Pet. App. C10-C11; Tr. 34-35, 130, 141-142). Campbell, who was surprised by this announcement, told Dolph that he would fly back to Castle Island and "stand on the floats of the plane and wave," so that the employees would not conclude that the Union had lost interest in their election (Pet. App. C11; Tr. 35-36).

When Dolph and Campbell returned to Castle Island, Dolph agreed to allow Campbell to stand on the island's floating dock,[6] and volunteered to tell the employees of his presence there should any want to talk to him (Pet. App. C11; Tr. 36). Campbell stood on the dock under the plane's wing and signaled to the bunk house 100 yards up the bank. Dolph told the employees Campbell was on the dock. Three employees who were already Union members came down to speak with Campbell. The weather was bad, raining and blowing throughout the five to ten minute visit Campbell had with the employees. The three new workers did not come to the dock. Campbell left some copies of a contract, and requested that it be distributed among the other employees (Pet. App. C12; Tr. 36-38, 64).

The next evening, Wednesday, June 23, Campbell returned and stood on the dock as before. The bad weather continued. The three Union members came down to see him, and told him that the others probably would not "come out in [the] bad weather." One member went to the bunk house to try to get other

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[6] Jutting out from Castle Island is a floating dock constructed of planks laid flat over logs, linked together. The dock, which extends for 250 feet, rises and falls in response to tidal variations, with the entire dock afloat during high tide and only the last few logs water-borne during low tide (Pet. App. C5-C6; Tr. 108-109).

employees to come, but failed (Pet. App. C13; Tr. 38-39). The Union filed formal charges of unfair labor practice on that day.

On Thursday, June 24, Campbell telephoned Perman, a Board field examiner, who was to conduct the election at Castle Island, and reported that the Union had filed unfair labor practice charges against the Company. Perman suggested that Campbell meet his plane in Petersburg the next day, shortly before noon (Pet. App. C13-C14; Tr. 41-43). Meanwhile, Company counsel Loeffler arrived at Castle Island on Thursday. He and Dolph agreed to let Campbell on the island if he appeared, and to let the employees speak with him. They did not, however, call Campbell in Petersburg to tell him that the rule concerning his access had been changed. When Campbell did not show up,[7] it was agreed that he would be invited to lunch on Friday (Pet. App. C14; Tr. 134-135, 150-151).

On Friday morning, June 25, Company management dispatched a radio message to the charter airline service in Petersburg, requesting that the airline call Campbell, on behalf of the Company, and invite him to lunch with the employees, without management present, to discuss the Union. The airline relayed the message to Campbell, who declined the invitation because of his appointment with Perman (Pet. App. C15-C16; Tr. 43-44, 101, 151-152). When Perman arrived, he told Campbell that the Board's Regional Director had decided to go ahead with the election but impound the ballots. The two men went to the island, the election was held, and the ballots were impounded pending the outcome of the present unfair labor practice case (Pet. App. C16; Tr. 44-45).

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[7] Campbell did not go to the island Thursday night because he considered a further visit to be futile in view of the Company's position (Pet. App. C14; Tr. 76).

2. The Board held that the Company violated Section 8(a)(1) of the Act by refusing Campbell access to Castle Island for the purpose of soliciting the employees, during their free time, to join the Union and to support it in the scheduled Board election (Pet. App. C32-C33, C34). In so concluding, the Board, upholding its Trial Examiner, found that the location of the Company's Castle Island facility and the time the employees spent there placed them beyond the reach of reasonable Union efforts to communicate with them elsewhere (Pet. App. C16-C32). As the Board stated, "travel [by the Company's workers] into town, though feasible, clearly requires something more than a negligible expenditure of time and money; the likelihood that—with respect to any given date—the * * * Union's representative would find a significant number of [the Company's] workers 'accessible' without personally visiting their Castle Island camp merits characterization as minimal" (Pet. App. C19).

The Board ordered the Company to allow the Union access to Castle Island in order to communicate with the employees during their free time, "subject only to reasonable regulations concerned with the timing and frequency of such visits" (Pet. App. C35). The court of appeals, concluding that the Board's decision was "justified by the rule announced" in *National Labor Relations Board* v. *Babcock & Wilcox*, 351 U.S. 105, 112-113, enforced its order (Pet. App. A1).

ARGUMENT

In *National Labor Relations Board* v. *Babcock & Wilcox Co.*, 351 U.S. 105, 113, this Court stated that, "if the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with

them, the employer must allow the union to approach his employees on his property." In *Central Hardware Co.* v. *National Labor Relations Board*, 407 U.S. 539, 548, the Court reaffirmed the *Babcock* test, adding that, where the proper test has been applied, "[t]he determination whether on the record as a whole there is substantial evidence to support agency findings is a matter entrusted primarily to the courts of appeals."

Here, the Board found that the Company's Castle Island facility was a "remote physical situs" (Pet. App. C19) and that the employees were not accessible to the Union representative absent personal visits to Castle Island (Pet. App. C19, C26). The court below correctly concluded that substantial evidence supported the Board's findings, and therefore further review by this Court is not warranted.

Petitioner contends, however, that, under *Babcock*, before the Board can conclude that on-premises contact is necessary, the union must show that every other alternative was tried and failed. The Board believes that this requirement of strict exhaustion puts too narrow an interpretation on *Babcock*; that decision does not require the union to engage in a futile effort where, as here, the objective circumstances make it apparent that other methods of reaching the employees would be inadequate. However, it is unnecessary to resolve that issue here.[8] Until three days before the election, the Company had not barred Union Agent Campbell from its premises and had no general policy restricting public access to the island. Even at that time (June 22),

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[8] The Board's petition for certiorari in *National Labor Relations Board* v. *Tamiment, Inc.*, No. 72-371, certiorari denied, 409 U.S. 1012, presented a similar issue.

the Company initially welcomed Campbell onto the island and gave him every reason to believe that he could return to the island that evening, and each evening thereafter up to the election, to discuss unionism with the employees. Only after conferring with counsel later that day did the Company, for the first time, advise Campbell that he would not be permitted further access to the island. By that time, it was too late for the Union to reach the employees through such other methods of communication as may have existed.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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